



# The US anti-bribery law update

Companies based outside the US are well aware that US prosecutors and the Securities and Exchange Commission (SEC) are increasingly seeking to enforce the US Foreign Corrupt Practices Act (FCPA) against non-US entities and individuals. The prosecutors and SEC have adopted very broad interpretations of the FCPA and their jurisdiction over persons and business activities outside the US. At the same time, many other countries have adopted or increased their enforcement of similarly broad laws prohibiting foreign bribery. This briefing outlines the key facts and recent developments of which non-US entities need to be aware in relation to US anti-bribery law and its enforcement.

The broad reach of the US Foreign Corrupt Practices Act (FCPA) is by now well known among non-US entities engaged in transnational business. The mounting wave of FCPA enforcement in recent years, by the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC), has been impossible to overlook. Many other countries have adopted similarly broad prohibitions on foreign bribery, including the 37 state parties to the Organisation for Economic Co-operation and Development (OECD) anti-bribery convention. A new UK bribery law is expected to come into force this year.

What may be less widely appreciated is that, in successive enforcement actions, the DOJ and SEC have adopted very broad interpretations of the FCPA and their related jurisdiction over non-US entities and individuals. Non-US entities would be well advised to be aware that their US enforcement risk may be greater than previously understood.

## What is prohibited and required under the FCPA?

The FCPA comprises two sets of prohibitions and requirements, known as the 'anti-bribery' provisions and the 'books and records' provisions.

### Anti-bribery provisions

The FCPA anti-bribery provisions prohibit:

- any offer, payment or promise of anything of value;
- made 'corruptly' (ie with an intent to obtain an improper quid pro quo);

- directly, or through one or more intermediaries, to (i) any foreign official, defined to include any official, functionary or employee of a non-US government, state-owned enterprise or public international organisation, or (ii) any non-US political party or candidate;
- for the purpose of influencing any act or decision of such person, or inducing such person to exercise their influence with a non-US government; and
- to assist in obtaining or retaining business, directing business to any other person or securing any improper advantage.

Each of the elements above is broad in scope and some key terms (such as 'foreign official') are interpreted more broadly than a first reading may suggest.

### Books and records provisions

The FCPA books and records provisions require certain FCPA issuers (defined below) to:

- 'make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer'; and
- maintain 'a system of internal accounting controls sufficient to provide reasonable assurances that', among other things, 'transactions are executed in accordance with management's... authorisation' and transactions are recorded as necessary to prepare financial statements.

These provisions have increasingly formed the basis for broad-ranging enforcement actions against US and non-US issuers. Any improper payment or gift will typically not be fully and accurately reflected in the books and records of the issuer, or in those maintained by its local operations, thus triggering a violation. Even if the DOJ or SEC suspects, but cannot prove, that funds were used to pay a bribe, failure to account fully and accurately for those funds could be a violation of the books and records provisions. For this reason, it is typically much easier for the government to establish a books and records violation than an anti-bribery violation.

## Facilitation payments

The anti-bribery provisions of the FCPA contain an exception for 'any facilitating or expediting payment... the purpose of which is to expedite or to secure the performance of a routine governmental action' by a foreign official. However, the US government has recently attempted to narrow the scope of this exception, which was never as broad as it might have appeared at first glance. Based on recent enforcement actions and statements by senior DOJ prosecutors, it appears that the only clearly protected type of payment would be one satisfying all of the following criteria:

- the payment is small, non-repeated and made to obtain routine and minor governmental action within normal processing times;
- the payer has already met all the requirements for the routine governmental action; and
- if the payer is an FCPA issuer, the facilitation or expediting payment is expressly and accurately recorded as such in the payer's books and records.

As a result, many multinational entities have in recent years instituted a global prohibition on any facilitating payment that is not centrally approved in advance (sometimes excepting emergencies involving risk to life or health).

## Who must comply with the FCPA?

The books and records provisions apply to any 'issuer' that has registered US securities or is required to file certain periodic reports with the SEC (an FCPA issuer). Any other individual or entity is subject to civil or

criminal enforcement if it causes, or is involved with, any violation by an FCPA issuer of its books and records obligations.

The anti-bribery provisions of the FCPA apply to:

- any US citizen or US resident located anywhere in the world;
- the worldwide operations of (i) any FCPA issuer or (ii) any entity, partnership, business trust or organisation formed under US law or having its principal place of business in the US (a domestic concern);
- any person who is an officer, director, employee, 'stockholder' or agent of, and is 'acting on behalf of', an FCPA issuer or domestic concern; and
- any other person 'while in the territory of the United States', a concept with surprisingly broad application, as noted below.

The application of the FCPA to any officer, director, employee, agent or stockholder of an FCPA issuer or domestic concern is frequently overlooked. Non-US persons acting outside the US have been subject to FCPA enforcement solely on the basis of being employed by an FCPA issuer or domestic concern. Christian Sapsizian, a French citizen, was sentenced in September 2008 to 30 months in prison for bribes arranged and paid outside the US. He was arrested at a Miami airport while on layover, en route to Paris. Jurisdiction was based on the fact that his former employer had American depository receipts listed in the US and he caused related payments to be wired from US banks.

## Expanding jurisdiction and theories of liability

Under the anti-bribery provisions, the words 'in the territory of the United States' are given an extremely broad interpretation by the DOJ. An internal DOJ manual notes that, '[a]lthough this section has not yet been interpreted by any court, the [DOJ] interprets it as conferring jurisdiction whenever a foreign company or national causes an act to be done within the territory of the United States by any person acting as that company's or national's agent'. In October 2006, SSI International Far East, a non-US company whose relevant employees were located outside the US, pleaded guilty to criminal anti-bribery charges and paid a \$7.5m penalty. The sole basis for US jurisdiction was the fact that the company

'transmitted requests' to persons located in the US to make improper payments to non-US persons. Continuing this trend, in 2009 two UK nationals (including a UK solicitor) were indicted in a US federal court for acting as intermediaries for Kellogg Brown & Root in bribing Nigerian officials. In subsequent UK extradition proceedings, the US government contended jurisdiction was sufficiently established because defendants acted as 'agents' of the US issuer and some of the payments were routed through a New York bank account.

In a number of cases, FCPA prosecutors have tried to bolster their jurisdiction over non-US persons, who are not US issuers and may not have taken substantial action within the US, by employing general US criminal law principles such as 'conspiracy', 'aiding and abetting' and 'scheme to defraud', which apply broadly to alleged concerted action. To these theories we find added for the first time in 2009 'control person' liability, under which an entity may be held responsible for the FCPA violations of another over which it has influence and failed to supervise. The case against Nature's Sunshine Products, described below, illustrates this broad theory. A similar approach used by the DOJ is to prosecute a non-US person associated with a US company as an agent of the US company, even if the non-US person took no action in the US. The case against Jeffrey Tesler is an example of that approach.

In 2009, the DOJ made use of criminal money laundering laws a priority as a means of expanding its jurisdiction over corrupt government officials and effectively its ability to prosecute FCPA violations (by increasing the range of available penalties). In November 2009, Lanny Breuer, the Assistant Attorney General of the DOJ's Criminal Division announced that he has directed all Criminal Division prosecutors to consider in every case whether it is appropriate to seek 'to forfeit and recover the proceeds of foreign corruption offense'. Ten of the 26 FCPA prosecutions in 2009 included a forfeiture charge.

Note that the anti-bribery provisions will apply to a non-US company or non-US citizen located outside the US only if that person makes use of a 'means or instrumentality of [US] interstate commerce'. The government will assert that this jurisdictional requirement is easily satisfied and that action as minor as sending mail or email to a recipient within the US will suffice.

## **Bottom line for non-US entities with US operations**

An entity that is not formed under US law, is not based in the US and has not issued registered US securities is not generally required to comply with the FCPA. However, any US affiliates of that entity, and their officers, directors and employees, are required to comply. Any officers, directors and employees of the non-US entity who are US nationals are also required to comply, wherever in the world they are located.

As noted above, even a non-US entity (that is not an FCPA issuer) and its non-US personnel could be caught by the FCPA if the entity or personnel take action or cause action to be taken within the US in connection with any arguably improper conduct. Whenever a non-US entity takes action with or through a US person or a US affiliate, its jurisdictional exposure to FCPA enforcement risk may be increased.

## **FCPA enforcement actions**

The upward trend in FCPA enforcement by the DOJ and SEC overall, and particularly cases targeting individual defendants, continued in 2009. Overall enforcement cases are up 45 per cent over the prior year and FCPA cases against individual defendants are up 80 per cent. DOJ officials have reported that more than 130 open investigations are pending, for which additional resources are being allocated.

The following is a selection of major enforcement actions that have involved a particularly novel approach by the DOJ or SEC over jurisdiction, the scope of prohibited conduct or the severity of the penalties imposed.

### **Halliburton Co, Kellogg Brown & Root LLC (KBR), Tesler and Chodan**

In February 2009, Halliburton resolved criminal and civil FCPA charges by agreeing to disgorge \$177m in alleged illicit profits to settle an SEC complaint, and its former subsidiary KBR entered a guilty plea and agreed to pay a \$402m fine, for alleged payment of bribes to officials of Nigeria for contracts to develop gas pipelines. Jeffrey Tesler, a UK solicitor who acted for the joint venture formed to bid on the Nigerian contracts, was alleged to have been the conduit for the bribe payments. Tesler was arrested by the London police, and in extradition

proceedings in November 2009 argued that the US lacked jurisdiction over him because the alleged offenses were 'directed against the country of Nigeria'. Tesler also claimed that extradition would be unfair because of a pending criminal investigation by Britain's Serious Fraud Office (SFO). The US government responded that 'the SFO has ceded jurisdiction to the United States', and that jurisdiction over Tesler was established because he acted as an 'agent' of a US issuer and because the bribe payments were routed through a New York bank account.

#### **Nature's Sunshine Products, Inc, Faggioli and Huff**

The US securities laws hold liable anyone 'who, directly or indirectly, controls any person liable' for violating one of its other provisions, including, it appears for the first time in this case, the FCPA anti-bribery and books-and-records provisions. As developed by US courts, so-called 'control person' liability attaches if the following can be shown:

- a primary violation by a controlled person or entity;
- the ability or authority to direct the actions of the controlled person, and in the case of a controlled entity, some direct involvement in its affairs; and
- the control person 'culpably participated' in the misconduct – ie knew or should have known of the primary violator's misconduct – or failed to act in good faith.

In July 2009, Nature's Sunshine Products (NSP) and its CEO and CFO settled civil FCPA charges with the SEC resulting from the alleged payment of bribes to customs officials in Brazil to avoid having NSP's vitamins and nutritional supplements reclassified as medicines. The payments were inaccurately classified in the books of NSP's Brazilian subsidiary as 'importation advances' and these book entries were rolled up into the company's ledger at year end. An operations manager for the subsidiary notified a US-based controller that he had concerns the company's products were being illegally imported into Brazil and that the company was paying exorbitant fees to its customs brokers to facilitate it, but apparently no investigation was made of these 'red flags'. On these unremarkable facts, the SEC charged NSP's CEO and CFO on a 'control person' theory for payments made at the foreign subsidiary level, which they neither authorised nor of which they even had knowledge. It appears they were charged solely because they were

responsible for and failed adequately to supervise the personnel and company processes involved in the illegal payments, resulting in inaccurate books and records and a failure of internal controls for its Brazilian products.

It is worth noting as well that the SEC also added a charge against NSP and the two officers of violating the anti-fraud provisions of the US securities laws because the company's annual financial statements failed to disclose information about the payments to the Brazilian officials.

#### **Pride International, Inc and Benton**

In December 2009, the SEC charged Bobby Benton, a former senior officer of Texas-based offshore rig operator Pride International with FCPA violations for his involvement in several payment schemes. In one, he was alleged to have received a report of a single payment to a Mexican customs official and failed to inform Pride's management, legal department or internal auditors. In a separate scheme, Benton allegedly came into possession of a document describing a proposed 'action plan' to address internal control weaknesses, which mentioned \$384,000 in improper payments to officials at Venezuela's state-owned oil company that had been discovered as part of an internal audit. He was alleged to have 'redacted' references to these payments in a sanitised version of the document he sent to another manager. Also, in connection with the outside auditors' annual review of Pride's operations, Benton allegedly falsely certified that he knew of no bribes or other FCPA violations by Pride and its subsidiaries. Benton was not alleged to have been involved in making the illegal payments or to have had contemporaneous knowledge of them. Nonetheless, he was charged with violating the FCPA anti-bribery, book-and-records, and internal controls provisions, as well as aiding and abetting Pride's violation of the same, for what appears to be solely taking action to prevent internal discovery of the payment scheme.

#### **Siemens AG**

In December 2008, Siemens pleaded guilty to criminal internal controls and books and records charges, and three of its subsidiaries pleaded guilty to conspiracy charges. Siemens' circumvention (or absence) of internal controls led to corrupt payments of at least \$805m being made. The charges also related to kickbacks involving the UN Oil-for-food programme and to corrupt payments

made to secure favourable treatment for projects in Argentina, Venezuela and Bangladesh. The companies agreed to pay combined fines of \$450m to settle DOJ enforcement proceedings. Separately, Siemens agreed to disgorge \$350m in profits to resolve an SEC action and to pay fines and disgorgement of C395m to resolve a related investigation by the Munich public prosecutor's office (in addition to C201m already paid in respect of an earlier settlement). Siemens was a non-US issuer listed on the New York Stock Exchange.

## Multi-jurisdictional enforcement

In recent years, largely at the instigation of US business interests eager to level the international playing field, several international treaties and conventions have been concluded to combat bribery of foreign public officials. These include, most importantly, the OECD anti-bribery convention and the United Nations Convention against Corruption. Today, multinational entities based in most developed countries are required to comply with laws criminalising foreign bribery that are similarly broad to the FCPA (though often not enforced as aggressively or with as broad an extraterritorial scope).

Partly as a result of these treaties, many countries including the US have recently shown a new willingness to assist one another in anti-bribery enforcement actions. This includes informal sharing of leads and tips in current or potential enforcement actions and gathering evidence for investigations. For example, the DOJ's recent investigation of Halliburton/KBR involved co-operation from authorities in France, Italy, Switzerland and the UK.

In the past two to three years, there has been a remarkable increase in the number and scale of anti-bribery investigations launched by developed countries against their own companies. The UK's Financial Services Authority recently imposed a £5.25m fine on Aon Ltd, the principal UK subsidiary of US-based Aon Corporation, for failure to establish effective anti-bribery controls. In addition, there has been an increasing number of anti-bribery investigations and enforcement actions brought by developing countries, under their domestic laws, for improper payments made to their government officials by foreign companies.

Non-US entities therefore face a growing risk of a multiplicity of investigations and sanctions in several jurisdictions from what is arguably a single instance of improper conduct. The growing trend for multi-jurisdictional enforcement actions brings compounded risks and challenges that call for the engagement of experienced international counsel.

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